81-2328

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HELLENIC LINES LTD.,

Petitioner,

—against—

PASQUALE FANETTI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MORRIS CIZNER
Counsel for Respondent
160 Broadway
New York, New York 10038

Questions Presented

Basically, Petitioner's position is that although it is *one* company organized to own and operate ships as well as to perform its own stevedoring work, it is to be considered as two separate companies as far as longshoremen are concerned—one a shipowner and the other a stevedore. They justify their split personality by pointing to *Reed* v. *The Yaka*, 373 U.S. 410 (1963). The latter case merely permits suits by a longshoreman against his employer if they are also shipowners. It does *not* wipe out an employer-employee relationship with duties and obligations flowing therefrom. Nor does *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) change the *Reed* v. *The Yaka* holding or rationale.

Furthermore, on the facts here, where the dangerous condition was created by the ship's crew who were engaged in a negligent method of operation in a walking area on deck, under their control, shipowner would in any event be primarily liable for the harm resulting from the crew's activity. *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981). Petitioner attempts to confuse the case raising false issues with the hope of a radical change in the basic law heretofore applicable in maritime cases. The real questions presented are, therefore:

1. Should this Court change the basic law governing employer-employee relationships so that an employer has no duties or obligations to its employees if they are longshoremen?

2. May a shipowner act in a negligent manner and still escape all responsibility for the results of its affirmative acts with disregard for the health and safety of longshoremen?

3. Does Sec. 905(b) of 33 USC intend to deprive a longshoreman of his right to sue his shipowner-employer for its negligence?

With respect to the second question presented by Petitioner, on trial the defendant offered no testimony as to what the taxes would be on future earnings, did not object to the jury charge as it pertains to this matter; and the Circuit Court for the first time ruled that the after-tax principle of *Norfolk and Western Ry Co.* v. *Liepelt,* 444 U.S. 490 (1980) should apply to longshoremen's cases. The question should properly be:

1. Should the *Liepelt* principle be applied to a longshoremen's maritime negligence law suit?

2. If the after-tax rule does apply here, should cost of litigation and attorney's fees be deducted as an expense reducing the net future earnings accordingly?

Although respondent has suggested the "real" questions presented by the petitioner herein, there is no merit to the application for a writ of certiorari. The denial of the Petition would serve the interests of justice.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
I. Statement of the Case	1
1. Facts	1
2. Position of the Plaintiff	6
II. Reason for Denying the Petition for a Writ of Certiorari	8
1. False Issue Raised by Petition	8
2. The Petition Misinterprets the Applicable Case Law	11
3. The Petition Is Contrary to the LHWCA and OSHA Regulations	17
4. The Non-Existent Conflict Between Circuits and the Supreme Court Under the Facts Presented	22
5. The Evidentiary Ruling of the Trial Court Should Not Be Interfered With	26
III. Conclusion	29

TABLE OF AUTHORITIES

Cases: PAGE

Albergo v. *Hellenic Lines Ltd.*, 658 F.2d 66 (2 Cir. 1981) 16

Canizzo v. *Farrell Lines, Inc.*, 579 F.2d 682 (2 Cir. 1978, cert. den. 99 S.Ct. 316 (1978) 7, 14, 15

Cavalier v. *T. Smith and Son Inc.*, 668 F.2d 861 (5th Cir. 1982) 23

Doca v. *Marina Mercante Nicaraguense S.A. and Pittston Stevedoring Corp.*, 634 F.2d 30 (2 Cir. 1980, cert. den. May 4, 1981) 6-7, 11, 14

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) .....i, 9, 10, 12, 15, 16, 22, 28

Evans v. *Transportacion Maritime Mexicana*, 639 F.2d 848 (2 Cir. 1981) 7, 15, 16

Griffith v. *Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975) 22, 23

Jackson v. *Lykes Bros.*, 386 U.S. 731 (1967) 12, 13

Lang v. *Texas and Pacific Ry. Co.*, 624 F.2d 1275 (5th Cir. 1980) 27

McWeeney v. *New York, New Haven & Hartford R.R. Co.*, 282 F.2d 34 (2 Cir.) (en banc) cert. den. 364 U.S. 870 (1960) 28

Napoli v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976) 15, 23, 24

Norfolk and Western Ry. Co. v. *Liepelt*, 444 U.S. 490 (1980) .....ii, 27, 28, 29

Reed v. *The Yaka*, 373 U.S. 410 (1963).....i, 10, 12, 13, 15, 22

Richardson v. *Norfolk Shipbuilding & Drydock Corp.*, 621 F.2d 633 (4th Cir. 1980) 23

PAGE

Scindia Steam Navigation Co. Ltd. v. *De Los Santos*, 451 U.S. (1981) ..... i, 16, 25, 26

Sea-Land Serv. Inc. v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir. 1976) 24

Smith v. *Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir. 1979) 23, 24

Smith v. *M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977) 22

Other Authorities:

Compensation Act 21

Federal Compensation Law 23

FELA 27

Joint Maritime Safety Code 25

LHWCA Sec. 41a 9, 11, 13, 21, 27

OSHA Regulations 14, 17

Safety and Health Regulations for Longshoring, CFR 1918.1 et seq. 21

Senate Committee Report No. 92-1125, 92nd Congress, page 11 17

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. et seq. 17

33 U.S.C.—

Section 41(f) 15

Section 902(3) 18

Section 902(4) 18

Section 903(a) 18

Section 903(a)(1) 18

Section 904(a) 19

Section 905(b) ..... i, 10, 17, 27

Section 907 19

Section 941(a) ..... i, 21, 25

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I.

Statement of the Case

1. *Facts*

Our case involves an open and obviously dangerous condition in the walking area of the top or main deck of the defendant's vessel. It was in the pathway leading from the ship's ladder to the winch controls where plaintiff was required to work. The passage was obstructed, being cluttered with lashing gear including greased and oiled turnbuckles, chains and wires and the deck was oily and greasy. It was an area used in common by the ship's crew and longshoremen.

Our case involves an on-going negligent method of operation by the ship's crew creating and maintaining a hazardous condition throughout the day in a walkway, making it unsafe for longshoremen to go to their place of work.

The dangerous condition did not arise out of the loading or unloading work being performed by the longshoremen. It did not arise within the confines of the stevedoring operations. The ship's crew created the danger and were in control of and maintained the area. It was their duty, solely, to lash the cargo after the longshoremen had finished loading containers. In preparation for the performance of their work they were bringing the lashing equipment over to the raised deck and dumping it in the walkway. This on-going operation by the crew while the longshoremen were attempting to load cargo created a most hazardous condition. They performed their work in such negligent manner throughout the day so that at about 3.00 P.M. an area of about 10 feet in front of both ladders leading to the winch controls was dangerously obstructed and slippery.

The longshoremen were not hired to clean the deck; to supervise the ship's crew in the manner and method of the performance of their work; to perform housekeeping chores; to correct the work performed by the ship's crew while they were engaged in such performance; and to perform the lashing work. The crew was told not to do their work in the manner performed by them and were told to remove that which they created. They said they would but failed to do so. They could not rely upon the longshoremen supervising them or cleaning up the deck; nor could the longshoremen remove the large amount of such equipment and yet find time to perform the work they were hired to do. Nor did the longshoremen attempt to clean up after the seamen.

The longshoremen were the employees of shipowner hired to do loading and unloading of cargo only. There is no independent contractor relationship here—legally or factually. There is more than a measure of supervision and control of the activity of the longshoremen exercised by Hellenic Lines, including the ship's officers, and there is no "dichotomy between shipowner and stevedoring functions".

The ship's crew were performing their work in a negligent manner and the deck was made dangerous. They failed to correct same when it was their responsibility to do so. As a result of their negligent conduct, plaintiff was injured. The jury so found, and justifiably so.

Plaintiff, a longshoreman then 39 years of age, was injured on May 6, 1980 on defendant's vessel, the S.S. HELLENIC SPLENDOR, which was docked at the 57th Street Pier, Brooklyn, New York. He was employed by the defendant as a winch operator. Heavy lifts (containers and heavy cases weighing over 5 tons each) were being loaded in and at Hatch No. 2. A baby jumbo boom located forward of the hatch was being used. This necessitated the operation of winch controls forward of the hatch for up and down movement and the operation of winch controls aft of the hatch for swinging the boom inshore and offshore.

At the time of the accident plaintiff was going to the forward winch controls to relieve a winch operator but he never got there for his accident occurred en route to his place of work.

The forward portion of the main deck from Hatch No. 2 forward was raised. The raised deck was the main deck. The winch controls for the baby boom were on this raised portion of the deck. They were located 10 feet forward of the No. 2 Hatch. The raised deck continued from these controls to the bow, a distance of another 40 feet. Actually, the raised deck was not a platform. There were 2 ladders leading to the raised deck forward. There was 1 ladder on the inshore side and one on the offshore side. To go to the winch controls you had to go up either ladder to the raised deck. When you get off the ladder you have to go 10 feet to get to the controls.

The ship's crew rigged the baby boom to be used by the longshoremen in the loading of metal containers 20′ x 8′ by 8′ and 40′ x 8′ x 8′, weighing over 5 tons each. The con-

tainers were full. The ship's crew were engaged in an ongoing operation of preparing themselves to perform their lashing work to secure these heavy lifts. They were required to do the lashing, but not until the longshoremen were finished with the loading operation. The ship's crew brought over the lashing equipment consisting of turnbuckles made of metal 2½-3 feet long each; wires, the thickness of a finger 20 to 25 feet in length each; and chains. The equipment was greased and oiled to prevent rusting. They were ship's equipment, large enough presumably to adequately secure such heavy cargo.

The ship's crew placed this equipment on the raised deck at the ladders. When the longshoremen first started working at 8:00 A.M. there were a "few turnbuckles on deck near the forward part of No. 2". Throughout the day the ship's crew continued to bring more and more of this equipment and placed it on the raised deck so that by 5 minutes to 3, at the time of the accident, the entire area from the ladders to the place where the winch operators were to stand and perform their work had this equipment scattered thereon. It obstructed the passageway from the ladders to the winch controls. One had to step on top of such equipment in order to get to the place of work at the winch controls. There was no other way to go. The same situation existed on the raised deck from both ladders, forward on both sides of the deck to the winch controls. There was grease and oil on the deck which came from the greased equipment. It was described as "a mess on the deck". Plaintiff, in going to the winch, his place of work, slipped in the oil and grease, came in contact with the wires and turnbuckle, and fell. He never got to his place of work, the accident occurring approximately 4 feet from the offshore ladder.

Not only was the procedure on board the HELLENIC SPLENDOR to "tell" the crew to remove the equipment and not to put any more on the deck, and they conform—but the

longshoremen were not in a position to avoid the dangerous condition. They had to walk from the ladder over the obstructed area to get to their place of work. The accident occurred while en route to the place of work.

The Court and counsel understood that the place of the accident was not where plaintiff was to work, limiting the questions repeatedly to the conditions on the deck en route to the work area.

The longshoremen could not correct the dangerous condition. This would require a change of the careless method of operation engaged in by the ship's crew. Throughout the day they were increasing the amount of the lashing equipment with grease and oil in the walking area. When asked on cross-examination if he had ever moved a turnbuckle out of the way, plaintiff replied, "I could not do that because there were too many and I had to go to work."

The hatch boss told the seamen to take the equipment away and not to bring any more there. His instructions were to load or discharge the ship and that was all—, "Just loading, that's my job, not to clean the ship". Nor did the longshoremen have anything to do with the lashing of cargo.

The hatch boss cannot stop the work of the longshoremen when the crew does something wrong. It is the Chief Mate who can tell the longshoremen to stop working. The hatch boss had to report to the Mate. He testified:

> "Q. At this pier did the longshoremen work for the Hellenic Lines, Limited Steamship Company?
>
> A. Yes.
>
> Q. There is no private longshore company, is there?
>
> A. No.
>
> Q. At this pier, in your experience as a hatch boss, can you stop work?
>
> A. No, I can't stop work unless the superintendent, the chief mate, comes to tell me to stop work.

Q. What are your instructions when you see the crew is doing something wrong? What are you supposed to do?

A. I tell them not to do that a lot of time. I tell them not to do that, don't put that stuff over there, and many times it happen like that.

Q. If they don't correct the condition, must you continue working?

A. We are not going to stop. We are over there to make production, to work. If we stop every time there is something like that, we don't work then."

2. *Position of the Plaintiff*

1. The ship's crew created and maintained a dangerous condition of obstructing and slippery lashing equipment, consisting of greasy and oily turnbuckles, chains and wires, in the walkway of the main deck at the head of the ladder leading to the place of work. Complaints were made to ship's personnel, in accordance with the procedure on board ship, requesting they remove the obstructing and hazardous condition and not to continue to bring any further equipment to that area. The crew did not remove the equipment nor correct the dangerous condition, but continued to bring over more of same and increased the amount and area of the hazards so as to make same more dangerous. This was an ongoing operation by the seamen, negligently performed in an area under their control. Such a large and general condition of the deck made it necessary that plaintiff step on such equipment and the grease and oil thereon and therefrom while going to his place of work at the winch controls. The deck area involved was not within the confines of the cargo operations assigned to the longshoremen and did not arise out of the loading operations performed by the longshoremen. Under such circumstances:

A. The ship had the primary responsibility for the dangerous condition so created by them. *Doca* v. *Marina Mercante Nicaraguense S. A.* and *Pittston Stevedoring Corp.*,

634 F.2d 30 (2 Cir. 1980, cert. den. May 4, 1981) and *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682 (2 Cir. 1978, cert. den. 99 S.Ct. 316 (1978)).

B. In any event, HELLENIC LINES LTD., being both stevedore and shipowner hiring its own longshoremen, has the primary responsibility to inspect the work place and correct the dangerous conditions. There is no independent contracting stevedore upon whom shipowner may rely. *Canizzo* v. *Farrell Lines, Inc.* (Judge Friendly dissenting) and *Evans* v. *Transportacion Maritime Mexicana*, 639 F.2d 848 (2 Cir. 1981).

Under the circumstances the facts support the finding of negligence on the part of the ship and the jury was properly charged.

2. The jury verdict should not be disturbed. There was sufficient proof from which the jury could and did find defendant negligent and plaintiff permanently disabled.

3. Despite the claims made by shipowner herein, the real question is one of credibility of the witnesses and that is a question to be determined by the jury.

4. Shipowner took no exception to the judge's charge as it pertains to the matters raised, and approved of the special interrogatories that were submitted to the jury. Shipowner should not be supported now in its claim of error on the part of the District Court.

II.

Reason for Denying the Petition for a Writ of Certiorari.

1. *False Issue Raised by Petition*

The petition here should be denied since it is based on a false issue, misstatements of fact, serious errors in law and distortions of case holdings. There is no conflict within the Second Circuit, between Circuits, or with the Supreme Court decisions.

Petitioner's first Question Presented (Page 1 of Petition) is irrelevant and inapplicable under the facts of this case. Here the evidence shows that the ship's crew acted in a careless manner causing the accident complained of. They are responsible for their affirmative acts of negligence and there is no legal authority or principle which insulates a shipowner from responsibility for its affirmative acts of negligence in an area still under their control. This is particularly so where longshoremen (invitees) are required to walk in such area to get to the place of work. Our concepts of personal responsibility for our acts still holds one liable for the consequences which naturally flow therefrom when one can anticipate harm.

Therefore, on the facts here, whether an injured longshoreman is employed by an independent contractor or by the shipowner is immaterial.

Furthermore, it is naive to claim or hold that all shipowners are entitled to the identical "insulation" from liability. Responsibilities of shipowners vary with their business arrangements or contracts they enter into. It would be unjust to hold a shipowner equally free from responsibilities whether they hire expert independent contractors to perform for them or whether they assign their own employees to perform. In the former situation, the contractor

is primarily responsible for his employee's working conditions. In the latter situation, there is no one to whom shipowner can shift primary responsibility. They are attempting to shift it on to the longshoremen.

It is submitted that the rights of labor have not as yet eroded to the point where an employee hired to perform a specific task becomes responsible for the acts of his employer not involving this task. Nor can he be charged with having assumed the risks of his employment or the negligent acts of his employer.

Petitioner seeks to blur the issue further which must result in a philosophical irrelevant discussion. Petitioner seeks a response to the first Question Presented which would make it impossible for a longshoreman to sue his employer-shipowner regardless of its affirmative negligence. The question, as set forth, is open-ended and nebulous in scope. When read together with the Petition and the views expressed on appeal to the Circuit Court, it in effect claims that it is entitled to preferred treatment as compared to other shipowners; that it has no responsibilities towards its longshoremen even if petitioner is grossly negligent; that contributory negligence is a bar to the action; that where shipowner is concurrently negligent with others, it is insulated from liability; that it may defend against its employees by claiming assumption of risk; that its employees are charged with the negligence of shipowner and hence may not sue shipowner; that its longshoremen are not entitled to the same rights as other longshoremen employed by independent contractors under the law.

Under *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), the negligence of the shipowner stands on its own. The negligence of the shipowner is not imputed to the injured longshoreman. Since the shipowner's negligence in whole or in part caused the accident, it is responsible for 100% of the damages for its concurrent negligence.

The question Petitioner raises is couched in language which speaks in reverse, but the position of shipowner on this appeal and petition has been and is as set forth above.

The real issue here is whether an injured longshoreman, regardless of who employs him, can sue the shipowner for its negligence. Since that question has already been answered by *Reed* v. *Yaka*, supra and *Edmonds*, supra, this petition beomes frivolous.

Petitioner engages in an exercise in semantics when it attempts to show conflict with *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). On Pages 17 and 18 of the Petition it quotes from *Edmonds* and then concludes (19) that the Courts "must preserve the distinction between shipowner and stevedore"; and that case "mandates" that shipowner "be insulated from the consequences of the negligence of those employed in its stevedoring capacity".

Such conclusion becomes meaningless under the facts in our case. Here, the ship's crew performed their work in a negligent manner; they created the dangerous condition; they maintained such condition on deck at the head of a ladder in an area leading to the place of work; and they continued to perform such work in such unreasonable manner in an area under their control. What sense is there to insulating a negligent shipowner from the possible negligence of others in the use of said deck? The longshoremen did not supervise the ship's crew in the manner and method of the performance of their work on said deck.

Perhaps more cogent is the fact that the conclusion is unwarranted. It results from a misinterpretation of *Edmonds*. Petitioner omitted a portion of the Opinion which preceded the reference to the second sentence of Section 905(b) LHWCA. In that case shipowner claimed that under the first sentence a third party suit against the vessel is authorized when any part of the negligence causing the

accident is that of the vessel; that under the second sentence suits against the vessel may be barred when any part of the negligence is that of a co-worker also providing stevedoring service. The Court rejected such interpretation and construed the second sentence as permitting a third-party suit against the vessel providing its own loading and unloading services even when negligence in its stevedoring capacity contributes to the injury.

In such context, the question decided was—when can a third party suit against the vessel be brought? The Court's answer was that all longshoremen are to be treated the same, namely, all longshoremen may sue a shipowner as a third party for the injury caused by the negligence of a vessel. The emphasis is on the right to sue. Any negligence of a vessel permits a longshoreman to bring an action. By no stretch of the imagination could that be construed to "mandate" anything pertaining to shipowner's negligence. The Court did not interfere with the business arrangement or contract of employment entered into by the shipowner (voluntarily) and left untouched shipowner's obligations by reason thereof. The Court, however, did construe the Statute to leave untouched the rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover the entire amount of his damage from the ship.

2. *The Petition Misinterprets the Applicable Case Law*

The Second Circuit's Opinion in our case is logical and consistent with the holding of *Edmonds*. As the Circuit Court points out in *Doca* v. *Marina Mercante Nicaraguense S. A. and Pittston Stevedoring Corp.*, 634 F.2d 30 (2d Cir. 1980, cert. den. 5/4/81) where there is an independent contracting stevedore and the ship's crew creates the dangerous condition, the shipowner has the primary duty to correct such hazardous condition.

Shipowner's position is in the main irrelevant to the real issues in this case and by and large erroneous. *E.g.*, Defen-

dant here claims that although it is a shipowner employing its own longshoremen under the law as it interprets it to be, such a shipowner must be treated as two separate companies—one as a shipowner and the other as a stevedore, not an employer of longshoremen. Such claim is made despite the fact that there is only one company which owns and operates a vessel and hires its own longshoremen to load and unload cargo. Consequently, the defendant claims its split personality, or as it describes itself, as a company with "functional dichotomy", permits it to claim in this suit that it has no obligation to its longshoremen employees.

Shipowner claimed it relied on the L.H.W.C.A. as interpreted by the Supreme Court when it created its business structure. It claims that *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) left no doubt that the 1972 Amendments preserved the validity of *Reed* v. *Yaka,* 373 U.S. 410 (1963) which HELLENIC LINES viewed as precedent for its "organizational validity". It also claims that *Reed* v. *Yaka,* supra and *Jackson* v. *Lykes Bros.,* 386 U.S. 731 (1967) required that a shipowner who acts as its own stevedore must retain "functional dichotomy" which is "necessary for imposition of liability recognized long ago in Reed v. Yaka."

Aside from the questionable meaning that shipowner ascribes to its "organizational validity", how patterning its organization after *Reed* v. *Yaka* justifies its erroneous claims is hard to fathom. There is no proof on the record of the reason for patterning as claimed. *Reed* does not speak of a "functional dichotomy" as necessary for imposition of liability. The basis of the Supreme Court holding in *Reed* v. *Yaka* is not that there is any division of function between being shipowner and employer. The Court stated:

> "We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' We think it would produce a harsh

> and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service."

Reed v. *Yaka* simply holds that where shipowner is also the employer of longshoremen and one of them is injured on board a vessel, he may collect benefits under the L.H.W.C.A. which is provided for him by shipowner-employer and he may also sue the shipowner-employer in spite of his receiving compensation benefits and in spite of the wording of the Statute which refers to compensation as being the exclusive remedy against his employer.

In *Jackson* v. *Lykes,* the Supreme Court reaffirmed *Reed* v. *Yaka* stating that to hold that a longshoreman employed by an independent stevedoring company may recover against shipowner but a longshoreman hired by the same shipowner to do the same kind of work cannot recover, is contrary to Congressional intent. "We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Congressional Act."

The "imposition of liability" on shipowner, therefore, does not depend on its functional or corporate structure.

Shipowner claims that their stevedoring employees here have a primary responsibility to correct dangerous conditions and Hellenic Lines, as shipowner, has the right to rely on its stevedoring *employees'* compliance with OSHA Regulations. Shipowner complains that the Court did not instruct the jury adequately on its right to rely on its employees and the so-called relevant safety regulations to give the jury a concrete idea of what the employees' primary responsibility consists of.

There is no basis for such complaint under the facts here and shipowner is wrong as to the applicable law. The L.H.W.C.A. sec. 41a as well as the OSHA regulations are specifically directed to the *employers* obligation, not the employees.

Shipowner seeks to avoid its status as an employer of longshoremen on the false premise that once you give them the right to sue the employer-shipowner, you no longer have an employer-employee relationship but a separate stevedoring company—in effect an independent contractor which always has the primary responsibility to correct dangerous conditions. Such is not the applicable law to our fact situation. *Doca* involved an independent contractor, but the circuit court there held on similar facts to ours that shipowner had the primary responsibility.

Furthermore it has been established that a shipowner's right to rely on stevedores rests on the existence of an independent contractor wtih a primary duty to correct dangerous conditions. The status of an independent contractor must exist to begin with. The clearest expression of the rule is found in Judge Friendly's dissent in *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682 (2 Cir. 1978) stating that:

> "Where, as in that case, [Napoli] there is no independent contractor, it is part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no 'independent contractor' with primary responsibility upon whom the ship may properly rely. As the *Napoli* court rightly said in rejecting the district court's charge in that case:
>
> > a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore. Napoli, supra, at 508." (689-690)

The shipowner in *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976) was HELLENIC LINES, the same shipowner in our case.

Shipowner admitted in the appeal to the Circuit Court that Judge Friendly's view so expressed is contrary to its position but claims that his thinking does not set forth the current view of the law. They claim that he did not have the benefit of *Edmonds* (1979) and other subsequent decisions. Again shipowner is in error. They misinterpret and misquote *Evans* v. *Transportacion Maritime Mexicana* (decided 2 Cir. 1981),which repeatedly cites the *Canizzo* dissent and emphasizes the importance of the independent contractor status.

Therefore, under the facts here, shipowner has the primary responsibility to correct dangerous conditions they create and maintain in the walkway on deck whether there is an independent stevedoring contractor or the longshoremen are employed by shipowner. Hence, shipowner here could not rely on the longshoremen employees correcting the dangerous condition and the charge to the jury was proper.

Shipowner-employer here seeks a change of status and requests special consideration from the courts to relieve it from Congressional action. It would do this by having its employees considered as "employers" under the Act. They would have plaintiff, its employee, become an "employer" even if he does not have employees employed in a maritime service or engaged in a business. They would place plaintiff in a position of being substituted for shipowner as employer as the one responsible for the penal provisions in Section 41(f) of 33 U.S.C. for failure to comply with Section 41(a). Shipowner seeks to escape its responsibilities at the expense of plaintiff, an employee. This is contrary to *Reed* v. *Yaka*, supra; *Edmonds* v. *Compagnie Generale Transatlantique*, supra, and Congressional intent in passing the L.H.W.C.A. including the 1972 Amendments thereto. Peti-

tioner's interpretation would also make plaintiff a longshoreman with lesser rights and greater obligations than other longshoremen employed by independent contractors contrary to *Edmonds*.

Controlling in our case is the law which holds shipowner responsible for its own affirmative acts of negligence. The testimony here is that the longshoremen were hired to load and unload cargo. They were not hired to clean a walkway or to maintain a vessel or such portions which are not "within the confines of the stevedoring operations". *Scindia Steam Navigaiton Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981). Plaintiff never got to the place of work at the winch controls but was merely going there. The hazardous condition did not "arise during the process of loading or unloading". *Evans* v. *Transportacion Maritime Mexicana*, 639 F.2d at 856. The longshoremen could not be held responsible for the crew's ongoing operations.

Furthermore, the ship may not defend on the ground that the longshoremen should have refused to continue to work because they had to walk to their place of work over a dangerous area. *Scindia Steam Nav. Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981).

Petitioner cites *Albergo* v. *Hellenic Lines, Ltd.*, 658 F.2d 66 (2 Cir. 1981) in support of its position. There the basis of the Court's holding was that the plaintiff could easily brush aside the ropes in the area where he was working and so avoid harm. He undertook to do so but did not do so adequately. This was his place of work. It is submitted that in other respects the majority opinion in Albergo is contrary to law as set forth herein. Were Albergo followed as interpreted by shipowner, contributory negligence would become a bar to the action.

In our case shipowner had a fair charge, yet shipowner here asks this Court to have the jury charged that plaintiff, a longshoreman employee, must comply with OSHA. This

is particularly wrong when the dangerous condition does not arise from the loading or unloading of cargo but from the ship's crew in the performance of its work in a negligent manner.

Were this Court to hold shipowner free from liability on the facts in this case—no shipowner-stevedore could ever be found liable for its negligent conduct.

3. *The Petition Is Contrary to the LHWCA and OSHA Regulations*

The defendant shipowner errs in its interpretation of The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., the OSHA Regulations 29 CFR 1918.1 et seq. and misinterprets its duties and exaggerates its rights thereunder to a point where said Act and the OSHA Regulations are emasculated.

There is no provision in law or in the OSHA Regulations which directs a split of Hellenic Lines into two independent companies. The fiction that defendant seeks to impose, is not supported by the Statute nor anywhere else.

Congress intended that the rights of an injured longshoreman to sue a vessel should not depend on whether he was employed directly by the vessel or by an independent contractor. (Page 11, Senate Committee Report #92-1125, 92nd Congress.) He may sue the vessel for damages if his injury is caused by the negligence of the vessel in whole or in part. The same principle of finding ships negligent applies whether the vessel employs its own longshoremen as pertains when an independent contractor employs the longshoremen. If the longshoreman cannot prove negligent causation by the vessel he cannot be successful in his action against the shipowner.

This, however, does not change the legal status of Hellenic Lines nor does it create a dual corporation. It def-

initely does not relieve shipowner of its obligation under the Statute which merely states (Sec. 905[b]) that an injured longshoreman may sue his employer-shipowner for negligently causing his injury.

The Statute was passed for the benefit of the injured longshoreman and seeks to protect him. Under said Section the injured plaintiff does not cease to be an employee of shipowner but he is merely given the right to sue shipowner for its negligence.

A short analysis of the various paragraphs pertinent to the question here presented would be helpful:

Sec. 902 (4) defines an "employer" as one whose employees are employed in maritime employment in whole or in part upon the navigable waters of the United States.

Sec. 902 (3) defines "employee" as any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations. The term "employee" does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload any small vessel under 18 tons net.

Note that the Statute specifically excludes vessels under 18 tons. By statutory construction and by the very terms of the Act persons employed to load or unload a vessel over 18 tons are included within the definition of "employees". Clearly, therefore, longshoremen employed by a vessel are covered within the term "employee" and the term "employer" covers such employees of the vessel.

Sec. 903 (a) deals with coverage under the Act and requires payment of compensation for the disability or death of an employee as defined.

Under Sec. 903 (a) (1) the Statute again mentions persons engaged by the Master to load or unload small vessels under 18 tons and states that no compensation shall be payable to them. Again by the exclusion, a vessel over

18 tons that employs persons to load or unload is required to pay compensation benefits as an employer.

Sec. 904 (a) holds the employer liable for and shall secure payment to his employees of compensation payable under Sections 907, 908, 909 and under 904 (b) "compensation shall be payable irrespective of fault as a cause for the injury."

Under Sec. 907 the employer is required to furnish medical, surgical and other attendance or treatment as the injury requires. The liability of an employer for such medical treatment shall not be affected by the bringing of a suit against a third party.

Under Sec. 905 (b) actions against vessels are permitted whether the vessel is in fact a third party or if it employs the injured party, providing negligence of the vessel caused the injury. This does not change any employer status; does not change any provision of the compensation act as to compensation benefits and medical benefits payable thereunder; does not make a longshoreman a self-employed person nor does he cease to be an employee under the Act; and does not change all the principles which are to be applied to determine the negligence of a vessel.

Sec. 941 (a) imposes the duty on every "employer" to furnish and maintain places of employment reasonably safe for his "employees in all employments covered by this Act". It provides that the Secretary may determine by regulations what is reasonably necessary to protect the life, health and safety of such employees to prevent injury to such employees.

Thus nowhere is there a direction or even an implication that shipowner ceases to be plaintiff's employer or that shipowner cannot be an employer under the Act or that shipowner is relieved of its responsibilities and obligations as an employer to its employees. Were it otherwise, as shipowner seems to be claiming, the shipowner-

employer here would not be responsible to secure workmen's compensation to pay its injured employees nor be required to furnish and pay for medical care and attention to cure its injured employees.

While shipowner Hellenic Lines Ltd. administratively reported to the United States Department of Labor that it is in the steamship business and that a longshoreman in its employ was injured, it now claims that as a steamship company it has no obligation under the Statute to conform to the Statute. For example, in a compensation claim medical procedures to be performed require authorizations from the employer. In our case Hellenic Lines failed or refused to grant such authorization. They claim that the injured plaintiff should have arranged for and paid for such medical procedures himself in an attempt to mitigate damages. When it was pointed out that Hellenic Lines was required to grant authorization and failed to do so and it was they who flouted the statutory requirement and sought to impose an obligation on the injured man when the Statute intended to protect him from such hardship, the following transpired at trial.

"Mr. Reid: I object to this line of questioning. May we approach the bench?

The Court: Yes.

(At the side bar)

Mr. Reid: Your Honor, this claim is in compensation and she is treating under the compensation. We have a suit here for damages and in the suit for damages the shipowner has no duty, like he owes to a seaman, to furnish prompt, proper medical care and attention.

Under the compensation law, the stevedore is obligated to furnish the medical care to a longshoreman. What Mr. Lassoff is trying to do and to show is that I have an obligation to give this man prompt, ade-

quate medical care and attention by way of tests and medical treatment and that is not the law. That is the law for seamen but not for longshoremen.

Glaring is the claim that despite the foregoing sections of the Statute, only the stevedore is obligated to furnish medical care to a longshoreman and a shipowner-employer of longshoremen has no duty to furnish medical care and attention under the Statute. Such absurd result finds no basis in law. Such tampering with the Compensation Act without any legal or equitable basis, therefore, is gross in its implications.

Nor does the shipowner stop there in its erroneous claims. It now seeks to foist an interpretation of the Statute on this Court to the effect that it is not an employer and hence has no duties whatsoever running to its employees under the Statute.

Under 33 U.S.C. Sec. 941 (a) pursuant to which the Safety and Health Regulations for Longshoring, CFR 1918.1 et seq. were promulgated, it is the "employer" as defined in the Act who is responsible for violation or refusal to comply with the provisions thereof. Despite that, they claim that shipowner is not bound by any safety regulations but to the contrary it is the longshoremen who perform the work as such employees of shipowner who are responsible for any violation of same. There is no justification for such shifting of responsibility or changing of a contractual relationship between plaintiff and his employer. This employment arrangement was voluntarily entered into by shipowner and is binding in all respects. Yet shipowner claims that when its contract with its employees places it in a position of being responsible for a breach of a common law, maritime law or statutory obligation owed by an employer to an employee, such employment contract should be ignored. This is hardly a position which should be encouraged by the Courts.

4. *The Non-Existent Conflict Between Circuits and the Supreme Court Under the Facts Presented*

Petitioner's claim of conflict between the Opinion of the Circuit Court in our case and other cases is indicative of confusion on their part or an attempt to create confusion. They cite cases which are either totally irrelevant or are misrepresented as to their holdings,—so that what is against them becomes for them.

Petitioner claims *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 41-43 (3rd Cir. 1975) is in conflict with the lower court in our case when in fact it is not. Here the defendant as shipowner is charged with negligent conduct since the ship's crew created the dangerous condition in a walkway on deck; failed to correct the condition when they were in control of the area; maintained same; and performed their work in a negligent manner. There is no question but that on the facts here there was "owner occasioned negligence" which means that they were not relieved of liability. The entire discussion in the cited Opinion pertains to the question of whether or not an employee can sue his employer-shipowner under Sec. 905(b). That case was decided before *Edmonds* v. *Compagnie Generale Transatlantique*, supra.

In *Smith* v. *M/V Captain Fred*, 546 F.2d 119, 122-23 (5th Cir. 1977), plaintiff, a repairman, sued his employer-vessel for its negligence. The Fifth Circuit stated the question to be— "——whether the rule of *Reed* v. *The Yaka*, 373 U.S. 410,—survived the passage of the 1972 Amendments to the Longshoremen & Harbor Worker's Compensation Act". (120) The Court stated that the dominant intent of Congress was to help longshoremen. "Why should an employee be treated differently solely because the ship on which he is injured happens to be owned by his employer instead of a third party?" (122) All longshoremen should have the right to sue shipowner under the same circumstances. The Court noted that an employee

may sue his employer qua vessel if injured as a result of the vessel's negligence. It noted that *Napoli* v. *Hellenic Lines Ltd.*, 536 F.2d 505 (2 Cir. 1976) and *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, supra were in agreement with them.

In *Richardson* v. *Norfolk Shipbuilding & Drydock Corp.*, 621 F.2d 633, 634-35 (4th Cir. 1980), a barge was used to perform repair work. The only work performed by the barge was such repairs. The crane operator acted primarily as a repairman. His negligence caused the accident to plaintiff, a sandblaster. The Court held that a co-employee repairman caused the accident and so that defendant could not be sued under Sec. 905(b).

Similarly in *Cavalier* v. *T. Smith and Son, Inc.*, 668 F.2d 861, 862 (5th Cir. 1982) plaintiff's employer owned and operated a floating crane on a barge with a crew of a crane operator and a flagman. It was used to load and unload cargo. Plaintiff was a longshoreman employed in the hold of a vessel in connection with such stevedoring work. The accident occurred because of the negligence of the barge crew. The Circuit Court held that the crew and plaintiff were performing stevedoring services to the vessel and hence no suit could be brought under that Section.

None of the aforementioned are pertinent to our case. In an attempt to justify its erroneous view, Petitioner claims support from *Smith* v. *Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795-97 (2 Cir. 1979). They are again in error. The Court there held that shipowner remains liable for its own failure to exercise care. "For example, the owner retains the responsibility for supplying a safe place to work, although the stevedore assumes that responsibility when it is given exclusive control over the work place". (794) In our case shipowner retained control of the area—this was an open deck at the head of a ladder. The crew was supposed to correct the dangerous condition. They created it and left it knowing that the longshoremen had to walk in that area. They continued

to perform their work and repeatedly made the condition of the walking area more dangerous so as to be engaged in a dangerous method of operation.

In *Smith* v. *Eastern Seaboard Pile Driving, Inc.*, supra, plaintiff was a driver-repairman. The Circuit Court found that aside from the fact that there were negligent acts involving safety features which were akin to failure to provide a safe place to work,—it cannot be said that the "responsibility for providing a safe vessel from which to dive was at any time delegated to employees acting primarily as repairmen". (796) The Court went on to say that *"Although Eastern might have escaped liability if it had surrendered control over the operation to a sub-contractor that could supply and supervise its own divers, that course was not chosen"*. (796) (Emphasis supplied).

It is important to note that the Circuit Court also stated that courts are to be guided by land-based principles of tort law. It went on to say that *Napoli* v. *Hellenic Lines, Ltd.*, supra, "—imposed upon the shipowner a duty to the land-based employee equivalent to that owed to an invitee by a possessor of land". (795)

Thus, Petitioner's positions herein are in conflict with those in the *Smith* Opinion, yet that case is cited in support of same. Thus is confusion generated.

Petitioner is so pre-occupied with the word "functional" that it reaches to cases far beyond any relevancy here. The cited cases involve the question of jurisdiction under Federal Compensation Law. E.g., *Sea-Land Serv., Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 632-33 (3rd Cir. 1976). (As long as employment nexus with maritime activity is maintained, the Federal Compensation remedy is available regardless of situs of accident producing injury). The question in these cases is what specific work was an employee performing at the time of the accident so as to determine if there is a connection with maritime activity. The reasoning of Peti-

tioner is also flawed here. Arguendo such cases, when referring to "function" are doing so as it pertains to employees. Petitioner translates that to mean as it pertains to stevedores and shipowners. There is no basis for such translation and is erorneous.

Petitioner's observations with respect to *Scindia Steam Navigation Co. Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981) are erroneous. In our case we are not dealing with dangers created or which arise in cargo operations.

De Los Santos does hold that shipowner must exercise due care to avoid exposing a longshoreman to harm from hazards he may encounter in areas under the active control of the vessel during stevedoring operations.

Petitioner also errs in stating that shipowner is not to be burdened with primary responsibility for safety as set forth in Note 10 of *De Los Santos*. (p. 29 Petition). That footnote refers to cargo operations once stevedore begins its work. It does not deal with the question of primary responsibility. The opinion does refer to Section 941 of 33 U.S.C. as requiring the longshoreman's employer to provide a reasonably safe place to work and to take such safeguards with respect to working conditions as the Secretary of Labor may determine to be necessary. The Court's rationale was that the shipowner was not the common employer of longshoremen and therefore does not owe a statutory duty under Section 941. Obviously, the Court was referring to an independent contracting stevedore and its statutory duty.

However, the opinion does state that the shipowner does not have a general duty by way of supervision or inspection to discover dangerous conditions that develop "within the confines of the cargo operations that are assigned to the stevedore". This *is subject to there being no contract provision, positive law* or *custom to the contrary.*

In our case, Petitioner shipowner was the longshoreman's employer by contract; the condition was created by

the ship's crew; did not develop within the confines of cargo operations nor was the area assigned to the stevedore. Perhaps the better reference is to footnote 25 in *De Los Santos* in which the Court noted with interest the reliance of the Circuit Court (2 Cir.) on the Joint Maritime Safety Code which was described as "the commonly agreed on practices for working together safely" in the Port of New York. That Code states that the "owner, master and officers of the vessel shall supply and maintain in safe condition for use all—work spaces which are to be used in stevedoring operations".

The claimed unique tripartite maritime relationship (p. 30 Petition) in this case does not exist. There is merely a shipowner employer and its longshoremen employees. Again, shipowner exhibits flawed reasoning in an attempt to find merit in a review of the decision of the lower Court.

5. *The Evidentiary Ruling of the Trial Court Should Not Be Interfered With*

With respect to the second Question Presented by Petitioner pertaining to evidentiary matters, no conflict between cases or Circuits is even claimed. There are no grounds set forth justifying the Supreme Court granting certiorari. Petitioner is merely quarreling here with the opinion of the District Court and the Circuit Court (2 Cir.). Does such quarrel warrant the Supreme Court of the United States granting the Writ and hearing argument? The answer is obviously in the negative.

The reasons set forth in the Opinion in the Circuit Court (A15-A18 Petition) as well as in the Opinion of the District Court (A43-A45 Petition) pertaining to income tax, is both legal and equitable justification for the determination of the Circuit Court.

This is *not* a situation where shipowner's position had been clearly made to the Court and further objection would

be unavailable. Here shipowner did not urge at trial the position they now take; did not raise the issue at any time during the trial; did not indicate it was relying on tax returns; and did not object or take exception to the Court's charge pertaining to this matter. There was no ruling by the Trial Court on any requests to charge. After all the evidence was in, the trial completed and the jury verdict in, shipowner raised the issue for the first time on the post trial motion. Nor did shipowner at any time submit or offer any evidence in support of their present contention.

Petitioner cites *Lang* v. *Texas and Pacific Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980) as supporting its position. That case does not require any action by the Supreme Court here. That was an FELA case. At issue there was a request that the Court charge the jury, in effect, that the amount of the award is not taxable income to the plaintiff and should not be increased by reason of Federal income taxes. The Court there refused to so charge. In our case a charge to that effect was given to the jury. Other requests were simply not acted upon and ignored. The Circuit Court in *Lang* noted in Footnote 4, page 1279, the *Liepelt's* holding that the Trial Court erred in excluding evidence offered to show the effect of income tax on estimated future earnings. "Evidence of decedent's net income after taxes was not offered in *Lang*; this aspect of *Liepelt*, therefore, is not applicable". The same may be said for our case. The tax returns referred to by Petitioner were not an indication of future tax liability.

The Circuit Court (2 Cir.) noted in Footnote 7 (A17-A18 Petition) the variables that might effect future income tax liability. It is submitted that in addition to those listed, attorney's fees for the handling of this case and appeals and trial costs constitute deductible expenses.

In *Liepelt*, the lower court excluded evidence offered to show the effect of income taxes on decedent's estimated future earnings. They produced expert testimony by an

actuary as to what the taxes would be. There was no such offer of evidence here and no such testimony was excluded. Nor was there any objection made to the Judge's charge as it pertains to this matter. The Trial Court in our case did charge that the award would not be subject to income tax.

Liepelt was an FELA case. The Court pointed out that the measure of damages under the Act is decedent's financial contribution to his survivors had the accident not occurred. FELA, however, unlike a number of other Federal Statutes does not authorize recovery of attorney's fees by the successful litigants. The Court there pointed out in Footnote 9 that under a number of Federal Statutes the recovery of attorney's fees by the successful litigant was authorized. Therefore, there cannot be a claim of desired uniformity to deprive plaintiff of his right to deduct the cost of litigation including attorney's fees as an expense.

In *Edmonds,* the Supreme Court stated that Admiralty Law is judge-made law to a great extent and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 Amendments to the LHWCA and still is. The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law. Sec. 905(b) of 33 USC states that longshoremen may bring actions against shipowners as third parties in accordance with the provisions of Section 933. The latter Section was unchanged in 1972. We are, therefore, dealing with long established law applicable to longshoremen's suits and Congress apparently did not intend changing it. The case of *McWeeney* v. *New York, New Haven & Hartford R.R. Co.,* 282 F.2d 34 (2 Cir.) (en banc), cert den., 364 U.S. 870 (1960), has been the law in the Second Circuit and it did not permit deduction for income taxes. The Court there mentioned a number of reasons for their holding, amongst them being the offset of the cost of trial expenses and attorney's fees.

There is no indication that Congress intended to change that rule and a reading of *Liepelt* does not indicate a mandate by the Supreme Court to make such change in longshore maritime cases.

It is submitted, therefore, that should the Supreme Court grant a Writ of Certiorari on the second Question Presented, it should do so only for the purpose of passing on the question whether *Liepelt* must be applied to all longshore maritime cases and if so, whether trial expenses and attorney's fees in the case constitute a deductible expense.

Respondent however does not urge the granting of a Writ on the Second Question Presented since the denial of the Petition would do substantial justice in this case.

III.

CONCLUSION

There is no merit to Petitioner's claims. There is no legal or equitable reason to grant a Writ of Certiorari herein. It is, therefore, submitted that the Petition should be denied.

Respectfully submitted,

MORRIS CIZNER
Counsel for Respondent
160 Broadway
New York, New York 10038